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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

THE KROGER CO.,	:	Case No.: C-1-02-439
	:	
Plaintiff,	:	Beckwith, J.
	:	Sherman, M.J.
	:	
v.	:	
	:	
	:	
MALEASE FOODS CORP.,	:	
	:	
Defendant.	:	

EXPERT REPORT OF JONATHAN LIBBERT ON BEHALF OF THE KROGER CO.

The purpose of this report is to summarize my present analysis and conclusions related to the above matter. The opinions stated herein are as of the date of this report and I will reserve the right to further address additional matters or issues that arise as the case continues.

I was retained by the plaintiff to review documents and materials relating to three (3) sale-leaseback transactions with Balkhouse for three of Kroger's existing industrial facilities located in Bowling Green, Kentucky, Murfreesboro, Tennessee, and San Marcos, Texas. I was informed that defendant Malease Foods Corp. had rejected Kroger's exercise of a purchase option on each of the properties and that this action had resulted in Kroger's inability to complete a sale of the San Marcos property to the H. E. Butt Grocery Company. This transaction was scheduled for closing on or about April 1, 2003.

The main purpose of my review was to determine the amount of damages caused by the refusal of Malease to allow Kroger's exercise of the purchase option, both as to the present time and also in the future.

In order to reach my conclusions, I have examined a large collection of documents and materials, including the complaint filed in this case, the sale-leaseback documents and various items of correspondence between the parties.

QUALIFICATIONS AND COMPENSATION:

My background and qualifications are set forth in the attached curriculum vitae. My fee for this engagement is based upon an hourly rate of \$175.00 per hour, plus expenses.

**EXPERT REPORT OF JONATHAN LIBBERT ON BEHALF OF THE KROGER
CO. – PAGE 2**

OPINIONS:

I have calculated the amount of damages caused by refusal of Malease in two parts. These calculations are shown on the enclosed Exhibit A. The first part is the difference in monthly rent that Kroger has been able to collect due to this situation. If the lease for the San Marcos property had been renewed under normal business conditions by H. E. Butt Grocery Company, the rent would have been substantially higher than the amount that is currently being charged under the conditions that exist. That amount was computed to be \$237,267.94 for the time period of April 1, 2003 through October 30, 2003.

The second part is the loss associated with the fact that Kroger did not have access to the \$11,000,000.00 purchase price for purposes of reinvesting it in the market place. For this purpose, I have assumed a threshold rate for capital investments of 12 percent and calculated the monthly cost. From this cost, I then subtracted the actual rent received in lieu of the lost opportunity on the \$11,000,000.00. The net result is a monthly effect of \$61,875.00 and \$433,125.00 for April 1, 2003 through October 30, 2003.

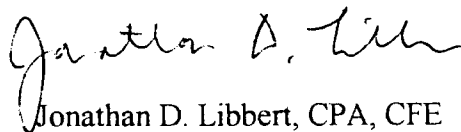
The continuing cost until the sale is closed is the sum of \$33,895.42 per month from the first part and \$61,875.00 from the second part for a total of \$95,770.42 per month.

In addition to the above ongoing costs, there is also the obvious exposure to a sizable loss being incurred if the sale of the San Marcos property is not finalized within a reasonable time and the buyer backs out of the transaction. Since a signed agreement is in place for \$11,000,000.00, any future sale for less than that amount would result in additional damages.

CONCLUSION:

In conclusion, it is my opinion to a reasonable degree of certainty that Kroger has suffered losses to date of \$670,392.94 and continues to be damaged at the rate of \$95,770.42 per month. It is also my opinion that should the proposed sale of the San Marcos property not be closed within a reasonable period of time, it may be subject to an additional loss as described above.

Sincerely you,


Jonathan D. Libbert, CPA, CFE

October 30, 2003
Enclosure

Financial Analysis
Kroger v. Malease Foods Corp.

Exhibit A
Printed:
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Monthly rent for San Marcos, TX warehouse under original sublease - first renewal	\$82,020.42
Monthly rent for San Marcos, TX warehouse under agreement effective 04-01-03	<u>(48,125.00)</u>
Monthly decrease in rent due to failure to close	\$33,895.42
Months from 04-01-03 to date of report (10-30-03)	<u>7.00</u>
Calculated Loss from decreased rent to date	<u><u>\$237,267.94</u></u>
 Selling price of San Marcos, TX warehouse to H. E. Butt Grocery Company	 \$11,000,000.00
Annual "threshold" rate for capital investments	<u>12%</u>
Annual return on investment for funds from sale	<u><u>\$1,320,000.00</u></u>
Monthly return	\$110,000.00
Less rental per agreement of 04-01-03 per above	<u>(48,125.00)</u>
Net monthly effect	\$61,875.00
Months from 04-01-03 to date of report (10-30-03)	<u>7.00</u>
Calculated Loss from inability to sell property to date	<u><u>\$433,125.00</u></u>
 Calculated Total Loss to Date	 <u><u>\$670,392.94</u></u>
 <u>CONTINUING LOSS:</u>	
Monthly decrease in rent due to failure to close	\$33,895.42
Monthly Loss from inability to sell property	<u>61,875.00</u>
Total Montly Continuing Loss	<u><u>\$95,770.42</u></u>

RE: THE KROGER CO. , Plaintiff
v.
MALEASE FOODS CORP. , Defendant

PRIOR TESTIMONY OF JONATHAN D. LIBBERT during preceding 4 years

1. Daimler Chrysler Corporation v. Wright State University
Case No. 99-05221
Court of Claims (Dayton, Ohio)

Deposed 10/99
2. Ruby Skeans v. Brien Freeman and Freemant and Copeland, et al
Case No. 98-CI-00063
Clay Circuit Court (Prestonsburg, KY)

Deposed 01/2000
3. Ronald E. Wyckoff v. Varanee Inkanangkul/Cincinnati Insurance
Case No. 99 CVC 04-3594
Franklin County, Ohio (Columbus)

Deposed 02/2000
4. Resthaven Memorial Gardens v. Cincinnati Insurance Company
Docket No. 3-00-0168
U. S. District Court, Middle District of Tennessee (Nashville)

Testified at trial 11/2001
5. Gary Huelsman v. Thyssen-Dover Elevator
Case number unknown
Hamilton County, Ohio Common Pleas Court (Cincinnati)

Deposed 03/2002
6. MTDL Acquisition, LLC v. Travelers Insurance Company
Civil No. 990902560
Third Judicial District Court of Salt Lake County, State of Utah

Deposed 04/2003
7. Hamilton County, Ohio v. Michelle Weimer
Case number unknown
Hamilton County, Ohio Common Pleas Court (Cincinnati)

Testified at hearing 06/2003
8. Travelers Casualty and Surety Company of America vs.
Strothman & Company, PSC, certified public accountants; and
Fields, Hawkins & Compnay, CPA's
No. 01-CV-565KKC
U. S. District Court, Eastern District of Kentucky - London Division

Prepared expert report 07/2003

Curricula Vitae of Jonathan D. Libbert, CPA, CMA, CFE

EXPERIENCE

Over thirty years of diversified experience with national and regional CPA and consulting firms, as well as industrial experience. Substantial individual experience in the financial institutions, construction, manufacturing, professional service, health care, retail and litigation support areas. Experience and knowledge covers the following manufacturing industries: steel, paper, plastics, chemical, various auto supply, foundry and metal working.

CERTIFICATION AND LICENSURE

2000	<i>Certified Public Accountant - CPA</i> - Tennessee, No. 16759
1995	<i>Certified Fraud Examiner - CFE</i>
1977	<i>Certified Public Accountant - CPA</i> - Indiana, No. 4868R
1976	<i>Certified Management Accountant - CMA</i>
1971	<i>Certified Public Accountant - CPA</i> - Ohio, No. 6923

EMPLOYMENT

1993/	<i>Johnson, Cambra & Libbert, Inc.</i> - Shareholder
1988/1993	<i>Reboul, Johnson & Henderson</i> - Associate
1984/88	<i>J. W. Harris Company</i> - Corporate Controller
1978/84	<i>Stop 'N Go Foods/King Kwik Minit Market</i> - Controller
1974/78	<i>Batesville Casket Co./Div. of Hillenbrand Industries</i> - Asst. Controller
1968/1974	<i>Ernst & Ernst (Ernst & Young), CPA's</i> - Auditor, Consultant, Supervisor

EDUCATION

1969	University of Cincinnati, Bachelor of Business Administration - Major in Accounting
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PROFESSIONAL MEMBERSHIPS AND ACTIVITIES

American Institute of Certified Public Accountants

Ohio Society of Certified Public Accountants
Past Member of Litigation Services Group

Indiana Association of Certified Public Accountants

National Society of Professional Insurance Investigators
Treasurer - National Organization
Past Treasurer - Ohio Chapter

Cincinnati Claims Association
Treasurer

Association of Certified Fraud Examiners

American College of Forensic Examiners

TEACHING

Taught various accounting aspects of insurance claims handling for Ohio Casualty and Travelers Insurance in Cincinnati, Chicago, Hartford and San Antonio.

TESTIMONY AND EXPERT WITNESS

I have testified and been named expert witness numerous times since 1988. I have also been named as an appraiser for insurance claims approximately 10 times.